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No. 27, Original.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION OF D. H. RUDDLE FOR A WRIT OF MANDAMUS TO HON. W. I. GRUBB, UNITED STATES DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ALABAMA, AND TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

IN THE MATTER OF THE APPLICATION of D. H. Riddle for a writ of mandamus to Hon. W. I. Grubb, United States district judge for the Northern District of Alabama, and to the United States District Court for the Eastern Division of the Northern District of Alabama.	No. 27, Original.

BRIEF FOR PETITIONER.

To a rule of this court upon the petition, seeking the issue of a writ of mandamus, a return has been made which does not deny that this remedy is proper and does not raise any issue of fact. In reality the return is no more than a re-statement of facts laid in the petition. The petition stands, therefore, as would a declaration in an ordinary suit coming to be heard on demurrer.

The issues are:

(1) Does the Federal Constitution prescribe for the trial, in a Federal Court, of one indicted for a felony, a jury of twelve men.

(2) Can the requirement of a jury of twelve be waived by the defendant in such a case.

Convenience and clarity in the argument will be promoted by a brief conspectus of decisions rendered by this court, defining the scope of Section Three and Amendments Five, Six and Seven and Fourteen to the Constitution of the United States, in relation both to a jury (its constitution and necessity) and to various other elements of a trial for a criminal offense—the appeal to the Constitution being upheld in some of the decisions and denied in others: These decisions in their substance, will be stated mainly in chronological order:

Except in regard to petty offenses the guaranty of an impartial jury in a criminal prosecution, conducted under authority of the United States, invalidates an original trial by a judge without a jury notwithstanding that there is a right of appeal to a court having a constitutional jury, *Callan v. Wilson*, 127 U. S. 540.

Due process of law forbids that an accused person be tried before a plea of not guilty is entered. *Crain v. United States*, 162 U. S. 625.

A "jury" as understood at common law and as used in our constitutions, Federal and State, signifies twelve men impanelled in the case to be tried, a less number is not a jury. A defendant, upon pleading not guilty, must

be tried by a jury of twelve men and he can not waive such a jury, *Thompson v. Utah*, 170 U. S. 343, *State v. Rogers, et al*, 162 N. C. 656, *Cancemi v. People*, 18 N. Y. 128, *Wilson v. State*, 16 Ark. 601, *Bell v. State*, 44 Ala. 393, *State v. Beebe*, 120 La. 493.

Article III and Amendment Six of the Constitution do not forbid the waiver of a jury in a trial for a petty offense. *Schick v. United States*, 195 U. S. 65.

In a territory incorporated into the United States in pursuance of a treaty by which the United States acquired possession and sovereignty the constitutional guaranties obtain and Congress did not have the power to deny trial by a common-law or jury of twelve to a person accused of a misdemeanor. *Rasmussen v. United States*, 197 U. S. 516.

Exemption of an accused person from self-incrimination though secured as against federal action by the Fifth Amendment of the Constitution, is not a fundamental right of national citizenship, and is not safeguarded against State action by the Fourteenth Amendment. *Twining v. New Jersey*, 211 U. S. 78.

The Philippine Bill of Rights and Amendment Six of the Constitution do not invalidate a trial of a prisoner, at large on bail, when, having been present at the commencement of the trial, he voluntarily absents himself from the later proceedings. *Diaz v. United States*, 223 U. S. 442.

The constitutional right to "a trial by jury" in a criminal case in the Federal Court means a trial by

twelve men presided over by one judge, all of whom must remain identical from the beginning to the end. It is not possible for either the Government or the accused, or for both, to consent to the substitution either of one judge for another or one juror for another. *Freeman v. United States*, 227 Fed. 732.

It has been long and conclusively settled that the Seventh Amendment exacts a trial by jury according to the course of the common law. *Minneapolis & St. Louis R. R. v. Bombolis*, 241 U. S. 211.

A Common Law Jury Is Peculiarly Demanded by the Adjudications.

In *Twining v. New Jersey, sup.*, rested by this Court on the *Slaughter House Cases*, the court said (211 U. S. 96):

> "There can be no doubt, so far as the decision in the Slaughter-House Cases has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. * * * But we need not

now inquire into the merits of the original dispute. This part at least of the Slaughter-House Cases has been steadily adhered to by this court."

The matter there under review was self-incrimination of the defendant upon a trial in a State court for a misdemeanor; and it was pointed out, by reference to other decisions, that the right to a common law jury in state courts stood upon the same ground. Protection of the citizen in these matters, and some others, was preserved by the eight first amendments to the Constitution wherever a Federal power was in question, and the Fourteenth Amendment, which demands of the states "due process of law" has no application to privileges and immunities which although fundamental, do not arise out of the nature and character of the National Government. Nothing was said to suggest any narrow interpretation of the Sixth Amendment, which is the guaranty of a jury trial in a Federal Court. The decision turned upon the distinction between the incidents and immunities of state citizenship on the one hand and Federal citizenship on the other hand. There was no reference to *Thompson v. Utah, supra,* and nothing to suggest any diminution from its weight as authority.

The offense (grand larceny) with which Thompson v. Utah was concerned had been committed when Utah was a territory, but the trial occurred after its admis-

sion as a state, and one of the issues was whether the trial by eight jurors, as authorized by the statutes of the state, was legal; and this court (170 U. S. pp. 349 and 351) said:

> "Assuming that the provisions of the Constitution relating to trials for crimes and to criminal prosecutions, apply to the territory of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161, 1 Chitty Cr. Law 505. This question must be answered oin the affirmative."
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> * * * * * * *
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> "When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him, except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the state not only to do what the United States, in respect to Thompson's crime, could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed."

Diaz v. U. S., supra, is peculiar in that, the defendant being on trial for a felony but being at large on bail,

his presence at the concluding stage of the trial was held not to be any more indispensable than it would have been in the case of a misdmeanor charge. The distinction drawn was between (1) a felony, with the defendant in custody, or a capital offense and (2) any charge, of non-capital character, when the defendant was at liberty to go and come. It seems safe to say this distinction has not been made explicitly in any of the earlier cases. The line was always drawn in those cases between a "felony," or a "crime," or a "disgraceful charge," and a "misdemeanor," or a "trivial charge."

The reasoning of the decision in the Diaz case would hardly apply to other immunities which were held by the early decisions to be guaranteed by one or another of the amendments to the Constitution. This would appear from the text of the decision itself, and the distinction between the case reviewed and the matter of a trial in a federal court by a common law jury is especially made clear. The court refers (p. 458) to *Hopt v. Utah*, 110 U. S. 574; *Lewis v. U. S.*, 146 U. S. 370; *Schwab v. Berggren*, 143 U. S. 442, and *Thompson v. Utah*, 170 U. S. 343 in order to say that they are not in conflict with what it is there deciding. It is pointed out that while two of those cases were concerned with absence of the defendant from the trial, this was forbidden by statute in the one case, and was the subject of an exception taken in the other case, and this follows: "The other two cases are even

less in point." Of *Thompson v. Utah* (after comment on the third case) it is said: "The question was, whether, when the applicable law contemplated that the accused should be tried before a tribunal composed of a court and a jury of twelve men, he could by his silence or consent authorize a tribunal differently composed, and not recognized by law to try him; and it was held that he could not." (pp. 458, 459.)

The very succinctness of this treatment of *Thompson v. Utah* would indicate its finality—the indisposition of the court to give serious consideration to any question touching the matter which had there been decided. It is not surprising that in *Minneapolis & St. Louis R. R. v. Bombolis, supra,* this court said the necessity of a trial by a jury according to the course of the common law has been "so long and so conclusively settled" as not to leave open to question the repugnance of the state's statute to the Federal Constitution.

The other cases cited above, relating to other elements of a jury trial, also indicate by their reasoning and by their silence upon that one question, a settled view of this court that a jury of twelve men is a *sine qua non* in a felony case tried in a Federal court.

As it happens, the effect of an attempted waiver by defendant of a common-law jury is the subject of peculilarly exhaustive discussion in some of the decisions of

the state courts. In regard to the weight to be given to such decisions by Federal courts, the United States Circuit Court of Appeals in Freeman v. United States (227 Fed. 746) said:

> "While the constitutional provisions of the states have no application to trials in the federal courts for offenses committed against the United States, they are nevertheless interesting as showing the deep-seated conviction of the people of the various commonwealths that the life and liberty of the citizens of this country should be protected by the courts against forfeiture except in accordance with the established principles of law which cannot be waived by the voluntary action of the individual."

In State v. Beebe supra (120 La. 493), although the State Constitution provided for a jury of five in such cases (not involving hard labor as punishment) the defendant was tried, without his objection, by a jury of twelve. On his appeal the Supreme Court of the State said:

> "The tribunal before which the accused was tried was therefore without jurisdiction in the premises, and as to him and his case is as though it did not exist. * * * If it be said that the defendant by failing to object to his trial by a jury of twelve

waived his right to be tried by a jury of five, the answer is that the constitution provides that he shall be tried by a jury of five, unless he waived that right, and in the event of such waiver the District Judge shall have authority to try him, but it no more confers that authority upon a jury of twelve than upon a jury of three or a mob of fifty." * * * "In State v. Thompson, 104 La. 167, it was held that: Parties accused of crime necessarily punishable at hard labor, have no legal right to waive trial by a jury and insist upon being tried by the District Judge; the reason assigned by the District Court for refusing to permit the accused to waive the jury being that the state has an interest in the preservation of the lives and liberties of its citizens and will not allow them to be taken away without due process of law. In State v. Ned, 105 La. 696, this court said: 'The constitution requires that * * * the accused should be tried by twelve men. He could not waive this requirement'."

In the Rogers case, 162 N. C. 656, the court, while deciding the jury question, touched on features of a common law trial which were deemed *not* to be indispensable in a strict sense. The court's conclusion is thus expressed (p. 869):

"A jury, as understood at common law and as used in our Constitutions, Federal and State, signi-

> fies twelve men duly empanelled in the case to be tried. A less number is not a jury. * * * A defendant may plead guilty, or *nolo contendere*, or *autrefois convict*, and of course the empanelling of a jury is unnecessary; but when he pleads not guilty in cases where a trial is guaranteed by the organic law, he must be tried by a jury of twelve men, and he cannot waive it."

If a common law jury is prescribed for a trial in a state court it is by the state constitution or by the Fourteenth Amendment to the Federal Constitution. In a Federal Court the mandates for such a jury are Article III and the Sixth Amendment of the Federal Constitution. If the ultimate question is the effect of the defendant's waiving a jury, state cases and Federal cases would seem to be on an absolute parity, and so it is assumed that the final decision of the state courts on this question will be regarded in this court as pertinent and as entitled to great respect.

The state cases cited rest upon a principle which has been recognized, in one way or another, in the Federal cases already cited and in some others. Thus in *Hopt v. Utah*, 110 U. S. 574 (579), this court, referring to its conclusion that the personal presence of the accused person at the trial could not be dispensed with, said:

"The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life,, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law."

The Trial Court's Record Is Open to Correction.

It is manifest that upon the record of the District Court this petitioner, taking the case to the Court of Appeals for review, could not raise the question that he was tried by a jury of less than twelve men. An obvious corollary is that the record should be made to state what actually occurred. Not often has this proposition been so questioned as to invoke rulings of appellate tribunals. There are adjudications, however, closely in point.

In the Cancemi case *supra* the trial court corrected its record by a *postea* to show that the jury was consti-

tuted of only eleven men, and this action was approved by the appellate court. (18 N. Y. 134.)

In *People v. Walker,* 64 Pac. 133, a motion was made in the trial court under a statute of the State of California, authorizing appeal from any order made after judgment affecting any substantial rights of the parties, to correct a minute entry which, as written, falsely implied that the requirements of the statutes of that state, in respect to the rights of the defendant, had been complied with. The motion was overruled and on appeal the Supreme Court said:

> "If a sentence is pronounced without a substantial compliance with these requirements and the clerk entered upa judgment upon a stero-typed form, showing full compliance, certainly the court has power to correct its minutes upon a proper application, and it ought to do so. * * *
>
> No question has been raised by counsel for the people as to the right to appeal from this order, but the question suggests itself and has been considered. We think the orders were appealable. They were made after final judgment. They affected substantial rights of defendant, and the errors to which the motion were directed could not have been reviewed on appeal from the judgment. * * *
>
> The only possible means by which he can save

an exception to an order of this character is by making a motion after judgment based upon a showing of the facts."

And after referring to the Section of the penal code before referred to, the court said:

"Under that provision and under that alone can a record be secured in such cases, upon which the errors of the trial court may be reviewed."

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